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No. 06-378

In The

Supreme Court of the United States

WILLIAM THURSTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF

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ARGUMENT

In the government's response to Thurston's petition for writ of certiorari, the government argues that the Court should deny the petition as to Question 1, and should hold the petition as to Questions 2 and 3 pending the Court's decisions in *Rita v. United States*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618, in which the Court granted certiorari after Thurston's petition had been filed.[1]

1. Question 1 concerns the proper standard of proof to be employed for finding facts that increase a defendant's sentence under the advisory Guidelines system, an issue of pressing importance in virtually every sentencing case. In Thurston's case, the district court applied twenty levels of enhancements under the Guidelines based on heavily contested factual findings—such as amount of "intended loss"—using a preponderance standard. The base offense level for conspiracy under the applicable Guidelines is six with a resulting advisory Guidelines range of zero to six months' imprisonment. As a result of the judge's preponderance-based findings, the offense level jumped to 26 and the advisory Guidelines range to 63 to 78 months (capped at five years by 18 U.S.C. § 371). Thus, this case presents a clear and compelling context for resolving this question.

The government incorrectly suggests that the Court's earlier jurisprudence resolved the issue in its favor (Brief for

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[1] This Court granted certiorari in *Rita* and *Claiborne*, 127 S. Ct. 551 (2006), on November 3, 2006, and petitioners filed their merits briefs on December 18. Thurston filed his petition on September 14, 2006, and this Court requested a response from the government by October 30. The government filed its response on December 19 after two requested extensions.

the United States ("U.S. Br.") 10-12), and ignores the contrary observation of one member of this Court in *United States v. Booker*, 543 U.S. 220 (2005) (Pet. 15-16 (citing *id.* at 319 n.6 (Thomas, J., dissenting)). The government relies on this Court's pre-*Booker* decisions in *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), *Edwards v. United States*, 523 U.S. 511 (1998), and *Witte v. United States*, 515 U.S. 389 (1995), for the proposition that this Court has "repeatedly made clear" that a district court may, consistent with the Constitution, impose a sentence within the statutory range based on facts found by a judge applying a preponderance standard. U.S. Br. 10.

Far from making the applicable standard of proof clear, only one of the cited decisions addresses the standard of proof issue, and it does so only in *dictum*. As this Court explained in *Booker*, *Watts* involved a "very narrow question" under the Double Jeopardy Clause and "did not even have the benefit of full briefing or oral argument." *Booker*, 543 U.S. at 240 n.4. Moreover, the *dictum* in *Watts* regarding the standard of proof rested on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), a 5-4 decision from which the Court distanced itself in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See* Pet. 14; *see also Watts*, 519 U.S. at 166, 163 n.2 (Stevens, J., dissenting) (criticizing *McMillan* as "incorrectly decided" and expressing the view that facts that increased the defendant's base offense level "should have been proved beyond a reasonable doubt").

The Court in *Witte* did not address, much less resolve, whether increasing a sentence based on a finding made under a preponderance standard violates the Fifth Amendment. Like *Watts*, *Witte* presented an issue arising under the Double Jeopardy Clause, and the opinion was confined to that issue. *See Witte*, 515 U.S. 389.

Nor does *Edwards* bear on the issue before the Court. At issue in *Edwards* was whether a sentence can be founded on a sentencing court's factual finding that the underlying offense involved crack as opposed to powder cocaine. 523 U.S. at 513-14. Although the Court held that a sentence could be based on such a finding in the circumstances of that case, the decision was silent as to what standard of proof a sentencing court must apply in making that factual finding. *Id.* at 512-16.

The government further contends that after *Booker* the "maximum [sentence] authorized" is simply "the statutory maximum for the offense under the United States Code." U.S. Br. 11. But the Court held in *Blakely v. Washington* that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" 542 U.S. 296, 303 (2004). *Booker* did not purport to vary this definition of statutory maximum. Thus, the Fifth Amendment requires that any fact that increases the sentence, even if the ultimate sentence is within the range set forth for the offense under the United States Code, must be proved beyond a reasonable doubt.[2]

This Court should grant certiorari on Question 1 now to address the applicable standard of proof for sentence-enhancing facts in the wake of *Booker*. The Court's analysis with respect to the standard of proof could conceivably be affected by the resolution of *Rita* and *Claiborne* because, as discussed in Thurston's petition (Pet. 16), the constitutional

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[2] The government's statement (U.S. Br. 11) that the courts of appeals after *Booker* have "consistently held" that a preponderance standard should be applied to facts found at sentencing ignores the Ninth and Tenth Circuit decisions cited in Thurston's petition (Pet. 17), which hold that due process may require a heightened standard of proof.

problem inherent in allowing a defendant's sentence to be increased based on facts found by the judge by a preponderance standard is magnified when the Guidelines are weighted more heavily than the other factors under 18 U.S.C. § 3553(a). Thus, alternatively, the petition as to Question 1 should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

2. The second question presented by Thurston's petition is "[w]hether it is permissible under the Sixth Amendment for a court of appeals reviewing a sentence for unreasonableness to give greater weight to the Guidelines sentencing range than to the other 18 U.S.C. § 3553(a) factors and to give less deference to district courts that impose sentences outside that range." Pet. i. The First Circuit uses a "sliding-scale" approach to reviewing sentences below the advisory Guidelines range. Under this approach, the First Circuit "consider[s] the reasonableness of a below-guideline sentence on a sliding scale: 'the farther the judge's sentence departs from the guidelines sentence the more compelling the justification based on the factors in § 3553(a) that the judge must offer. . . .'" App. 9a (citations omitted). At least four other circuits use this approach. *See* Pet. 18-19 (citing cases). This is similar to the approach taken by the Eighth Circuit in *Claiborne* but a somewhat different doctrinal formulation.

In recent decisions, the First Circuit has reaffirmed its requirement of increasingly compelling justifications for below-Guidelines sentences (essentially a presumption of unreasonableness), and has further demonstrated that this doctrine is related to what is in essence and effect, if not explicitly in name, a presumption of reasonableness for within-Guidelines sentences. For example, in one recent case, the First Circuit held:

> [W]e have recognized that sentences that fall inside a properly calculated guideline sentencing range require a lesser degree of explanation than those that fall outside the guideline sentencing range (whether above or below). *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006). Accordingly, a district court's statement of reasons for imposing a within-the-range sentence need not be as cogent as its reasons for imposing an outside-the-range sentence. *Cf. id.* (explaining that "the farther the judge's sentence departs from the guidelines sentence . . . the more compelling the justification . . . the judge must offer" (citation omitted)).

United States v. Turbides-Leonardo, 468 F.3d 34, 41 (1st Cir. 2006); *see also id.* ("It will be the rare case in which a within-the-range sentence can be found to transgress the parsimony principle."). Perhaps unsurprisingly, because of the undue weight afforded the Guidelines in the First Circuit, there is a stark difference between the results in below-Guidelines cases and those in above- and within-Guidelines cases. *See* Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at App. 6a, *Claiborne*, No. 06-5618 (Dec. 18, 2006) (summarizing results of analysis of post-*Booker* reasonableness-review cases in First Circuit: above-Guidelines sentences appealed by defendants and vacated (1/3); within-Guidelines sentences appealed by defendants and vacated (0/30); and below-Guidelines sentences appealed by government and vacated (4/4)).

A writ of certiorari should be granted here, and this case should be either consolidated for oral argument with *Rita* and *Claiborne*[3] or scheduled for later argument so that the issues

[3] Argument is presently set for February 20, 2007.

raised by those cases can be considered in the additional light that Thurston's case affords. *See, e.g.*, Brief of Washington Legal Foundation and Allied Educational Foundation as *Amici Curiae* in Support of Petitioners at 18-22, *Rita*, No. 06-5754, and *Claiborne*, No. 06-5618 (Dec. 18, 2006) (discussing *Thurston* as "good case study" of how adherence to Guidelines can violate the parsimony provision of § 3553(a)). Regardless, the resolution of Question 2 in this case may be affected by the Court's decisions in *Rita* and *Claiborne*. Accordingly, the Court should grant certiorari on Question 2 now, or alternatively, as the government suggests (U.S. Br. 12-13), the petition as to Question 2 should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

3. Question 3 of Thurston's petition is "[w]hether a district court has discretion under 18 U.S.C. § 3553(a) to avoid disparity between the sentence of a defendant who exercises his constitutional right to trial and that of a codefendant who pleaded *nolo contendere* but is otherwise similar." Pet. i. In its responsive brief, the government fails to differentiate Question 3 from Question 2, and characterizes them collectively as concerning whether "the standards applied by the court of appeals in reviewing [Thurston's] below-Guidelines sentence for unreasonableness are inconsistent with *Booker*." U.S. Br. 12; *accord id.* at 13 (stating that "Questions 2 and 3 . . . concern the standards for reviewing a sentence for unreasonableness"). Based on this imprecise characterization, the government argues without qualification that the Court should hold the petition as to both Questions 2 and 3 pending its decisions in *Rita* and *Claiborne* addressing "various aspects of [post-*Booker*] sentencing procedure." *Id.* at 12-13.

One critically important aspect of Question 3 does not appear to be subsumed within the questions presented in *Rita* and *Claiborne*—namely, the issue involving interpretation of 18 U.S.C. § 3553(a)(6), which requires sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The First Circuit's holding that Thurston's exercise of his right to trial rendered him not "similarly situated" to codefendant Isola, who pleaded *nolo contendere* to the same crime and was otherwise similar (except *more* culpable),[4] is patently wrong as a matter of statutory interpretation. Thus, Thurston's petition as to Question 3 should be granted and the First Circuit's decision reversed regardless of the outcome in *Rita* and *Claiborne*.

Other aspects of the First Circuit's disparity analysis could potentially be affected by the Court's decisions in *Rita* and *Claiborne*. For example, the First Circuit "acknowledge[d] the district court's concern that *too* wide a divergence between the sentence imposed on Isola and Thurston could negatively affect the public's 'respect for the law'" and could "undermine the accepted notion that similar conduct should be punished in a somewhat similar manner." App. 18a. The First Circuit nevertheless gave insufficient deference to the district court's determination that anything greater than a disparity of six months' confinement and a $25,000 fine would promote public disrespect for the law and

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[4] In a recent case, the First Circuit reaffirmed its holding, stating that "a district court may consider disparities among co-defendants in determining a sentence" but citing *Thurston* for the proposition "that a defendant who chooses to enter into a plea bargain is not similarly situated to a defendant who contests the charges." *United States v. Vazquez-Rivera*, No. 05-2632, 2006 WL 3593482, at *5 (1st Cir. Dec. 12, 2006) (citing *United States v. Thurston*, 456 F.3d 211, 216-17 (1st Cir. 2006)).

therefore run afoul of one of the core goals of sentencing codified in § 3553(a)(2)(A). Instead, the First Circuit set its own floor of three years' imprisonment and then remanded for the district court to carry out resentencing.

The outcome of Thurston's case could be affected by the Court's decisions in *Rita* and *Claiborne* to the extent they give guidance to the lower courts as to the weight to be given to the Guidelines, the role of the other § 3553(a) factors, and how the courts of appeals should review district courts' sentencing decisions. *See, e.g.*, Brief of Washington Legal Foundation and Allied Educational Foundation as *Amici Curiae* in Support of Petitioners at 22-25, *Rita*, No. 06-5754, and *Claiborne*, No. 06-5618 (Dec. 18, 2006) (discussing the goal of reducing unwarranted sentencing disparities, and arguing that *Thurston* is "Exhibit A in demonstrating the failure of the Guidelines to reduce disparity," especially because "the reduction of sentencing disparities of defendants accused of the same crime present the 'test case' to assess the legitimacy of the Guidelines"). Therefore, the Court should grant certiorari on Question 3 now, or alternatively, the petition as to Question 3 should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

CONCLUSION

As to Question 1, the Court should grant certiorari now to resolve the pressing issue of whether the Constitution requires a sentencing court to use a reasonable-doubt standard when making factual findings that increase a defendant's sentence under an advisory Guidelines system.

This case also presents an excellent and timely vehicle for the Court to evaluate whether the "sliding-scale" approach to reviewing outside-Guidelines sentences that has

been adopted by the First Circuit and several other circuits is consistent with *Booker* and 18 U.S.C. § 3553(a). Review by this Court would provide a helpful additional reference point for resolution of these issues in tandem with *Rita* and *Claiborne*. Thus, as to Question 2, the Court should grant certiorari now, and this case should be either consolidated for oral argument with *Rita* and *Claiborne* or scheduled for later argument so that the issues raised by those cases can be considered in the additional light that Thurston's case affords.

A critically important aspect of Question 3 regarding interpretation of 18 U.S.C. § 3553(a)(6) does not appear to be subsumed within the questions presented in *Rita* and *Claiborne*. Thus, although other aspects of the First Circuit's disparity analysis could potentially be affected by *Rita* and *Claiborne*, the petition as to Question 3 should be granted regardless of the outcome in those cases.

Alternatively, as to each question, the petition should be held pending decision in *Rita* and *Claiborne* and disposed of as appropriate in light of those decisions.

Respectfully submitted,

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